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November 21, 2006

The Honorable Kent A. Jordan
United States District Court for the District of Delaware
844 King Street
Wilmington, DE 19801

Re: AmberWave Systems Corp. v. Intel Corp – C.A. No. 05-301;
Intel Corp. v. AmberWave Systems Corp.– C.A. No. 06-429

Dear Judge Jordan:

Intel writes in response to AmberWave's letter to the Court dated November 20, 2006. The protective orders in the above-captioned actions[1] are the product of extensive negotiations between the parties and reflect considerable guidance from the Court. There is no reason to amend them. The Court has already ruled that, because the risk of inadvertent disclosure is significant, AmberWave's litigation counsel may not communicate with its prosecution counsel except in a transparent and narrowly-circumscribed manner. The Court has also previously rejected the notion – which is central to AmberWave's proposal here – that its litigation counsel can avoid inadvertent disclosure merely by practicing self-censorship. Finally, there is no basis for AmberWave's assertion that the parties' stipulation requires revision of the protective orders. That narrow stipulation reaches only the patents in suit in 05-301 (the "Consolidated Action"), none of which is at issue here.

I. AmberWave's Request Ignores the Court's Prior Orders

Currently, the protective orders bars Counsel of Record (as defined in the order) from communicating with prosecution counsel except through a regulated process in which Intel is provided advance notice and an opportunity to object. (05-301 D.I. 119, pp. 7, 14). Despite many

[1] AmberWave first raised the possibility of an amendment to the protective order in the Consolidated Action (C.A. No. 05-301) on November 17, only four days ago and over a month after seeking this conference.

months of negotiation, the parties were able to agree on the scope of this prosecution bar only after the Court took the matter up during its March 23, 2006 teleconference. AmberWave argued there that the prosecution bar should apply only to those members of its litigation team who actually review Intel AEO-Technical materials. Under AmberWave's proposal, the remaining members of its litigation team would be "outside the bubble" and able to participate in patent prosecution because their colleagues would engage in self-censorship. The Court rejected AmberWave's position, concluding, "If somebody is going to work on this litigation, this litigation that is informed by the attorneys' eyes only material, they're not prosecuting patents." *See* Exhibit A at 17:7-10. As the Court recognized, AmberWave's position simply did not reflect the realities of litigation:

> "I don't think anybody should be trusted to try to separate out in their own brain what they can and can't say to their own partners and associates in the context of litigation. They ought to be able to have free and open discussion. As they're doing that, some of this information may inevitably leak out." *Id.* 16:24-17:4.

AmberWave now takes that position (which this Court already rejected) one step further in arguing that *all* of its litigation counsel – including those who have reviewed Intel's AEO-Technical materials – should be allowed to participate in reexamination proceedings. *A fortiori*, this argument should be rejected as well. AmberWave is entitled by statute to respond to a rejection of claims by the PTO *by drafting new claims*.[2] Under AmberWave's proposal, the very attorneys who currently are combing through Intel's highly confidential technical information – developing theories for why Intel products infringe the '655 patent – would have unmonitored and virtually unlimited communication with the prosecution counsel who are charged with redrafting the very rejected claims that AmberWave intends to assert against Intel. AmberWave offers no explanation of how its litigation counsel would "separate out in their own brain what they can and can't say" during these reexamination proceedings. Nor could it. It simply is not possible for them to engage in the Sisyphean task of segregating Intel's confidential information into mentally inviolate compartments when discussing with AmberWave's prosecution counsel how best to evade prior art references.[3] Amending the protective orders would invariably result in AmberWave redrafting claims based on confidential information learned in this litigation – a perverse reward for obtaining a patent so weak that the PTO found it involves a "substantial new question of patentability" only months after its issuance.

AmberWave again attempts to re-plow old ground in claiming that it should not be forced to "have two independent sets of attorneys analyze and formulate positions regarding … identical prior art." The Court rejected this same argument during the November 8, 2005 teleconference, finding

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[2] In fact, AmberWave recently did just that in one of the other re-exams instituted at Intel's request. *See* http://portal.uspto.gov/external/portal/!ut/p/_s.7_0_A/7_0_CH/.cmd/ad/.ar/sa.getBib/.ps/N/.c/6_0_69/.ce/7_0_3AB/.p/5_0_341/.d/5?selectedTab=ifwtab&isSubmitted=isSubmitted&dosnum=95000150 (10/30/06 link to "Claim Amendment Not Entered")

[3] *See, e.g., Motorola, Inc. v. Interdigital Tech. Corp.*, C.A. No. 93-488-LON, 1994 U.S. Dist. LEXIS 20714, at *15 (D. Del. Dec. 19, 2004) ("The level of introspection that would be required is simply too much to expect, no matter how intelligent, dedicated, or ethical…the attorneys may be."); *CEA v. Dell Computer Corp.*, C.A. No. 03-484-KAJ, Jordan, J., 2004 U.S. Dist. LEXIS 12782, at *6 (D. Del. May 25, 2004) (holding that prosecution counsel should not be granted access to highly confidential discovery materials because that would create a "substantial risk of inadvertent disclosure").

that having two sets of attorneys is a necessary cost of maintaining confidentiality. *See* Exhibit B at 15:17-19. ("if that means you are going to end up with some duplication costs and expense to avoid revealing someone's highly technical information, maybe that is just one of the fallouts of modern day litigation, unfortunate but real"). Intel's litigation counsel of record was not involved in the re-examinations of the '655 and '449 patents. There is therefore nothing unfair about preventing AmberWave's litigation counsel of record from participating in those same re-examinations other than through the procedures set forth in the protective orders. In any event, AmberWave, which has now sued Intel six times and attempted on three occasions to splinter the parties' litigation between multiple courts, cannot credibly argue that it is unfairly being forced to incur litigation costs by respecting the terms of the protective order.

II. The Stipulation Is Inapplicable

Finally, the stipulation that the parties entered into in the Consolidated Action provides no basis for granting AmberWave's request. That stipulation is limited to the three patents at suit in the Consolidated Action, one specific patent application, and other patents that "may later be added" to that action. (05-301 D.I. 95). The third category applies only to patents that actually are added to the Consolidated Action. Under any other reading, the stipulation would apply to a potentially limitless number of patents – any one of which AmberWave is free to assert "might" hypothetically be added some day. Indeed, Intel rejected a prior draft of the stipulation that would have applied to patents "that claim[] priority to any application to which any one of the [patents in suit] claims priority" – and thereby would have encompassed the '449 patent – precisely because it was too broad. *See* Exhibit C (rejected text marked in exhibit).

AmberWave has repeatedly attempted to read this narrow stipulation as shielding its entire portfolio from invalidating prior art. AmberWave's position has no merit. The stipulation simply does not apply to the '655 patent, which is at issue in a separate lawsuit and did not even exist as a patent when the stipulation was entered.[4] The '449 patent, which is not now and never has been a part of the Consolidated Action, is also clearly beyond its scope.[5]

Respectfully submitted,

/s/ Karen E. Keller

Karen E. Keller (No. 4489)

KEK/prt
Attachments

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[4] Intel breached neither the spirit nor the letter of the parties' stipulation in filing a separate suit on the '655 patent. Intel filed a separate action to ensure that the case remained in Delaware and because at the time it believed the Consolidated Action was too far advanced to inject an entirely new patent into it. Intel's caution was well-justified; shortly after Intel filed suit on the '655 patent, AmberWave abruptly withdrew its pending motion to amend the Consolidated Action to add claims on yet another newly added patent, before Intel even had a chance to put in its responsive papers on the motion, and re-filed those claims in Texas.

[5] AmberWave has moved to amend its complaint in the Consolidated Action to add a claim for infringement of the '449 patent. As set forth in the parties joint letter dated November 6, 2006 Court, Intel believes the '449 patent claims should be combined with the '655 and '907 patents in the 06-429 action, which represents the second wave of patent litigation between the parties.

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

- - -

AMBERWAVE SYSTEMS CORPORATION,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
INTEL CORPORATION,	:	
Defendant.	:	NO. 05-301 (KAJ)

- - -

Wilmington, Delaware
Thursday, March 23, 2006 at 2:00 p.m.
TELEPHONE CONFERENCE

- - -

BEFORE: HONORABLE KENT A. JORDAN, U.S.D.C.J.

- - -

APPEARANCES:

MORRIS NICHOLS ARSHT & TUNNELL
BY: JACK B. BLUMENFELD, ESQ.

and

IRELL & MANELLA, LLP
BY: DAVID I. GINDLER, ESQ., and
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APPEARANCES: (Continued)

YOUNG CONAWAY STARGATT & TAYLOR
BY: JOHN W. SHAW, ESQ.

and

SIMPSON THACHER & BARTLETT, LLP
BY: GEORGE M. NEWCOMBE, ESQ., and
PATRICK E. KING, ESQ.
(Palo Alto, California)

Counsel for Intel Corporation

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P R O C E E D I N G S

(REPORTER'S NOTE: The following telephone conference was held in chambers, beginning at 2:00 p.m.)

THE COURT: Hi, this is Judge Jordan. Who do I have on the line?

MR. BLUMENFELD: Your Honor, it's Jack Blumenfeld for AmberWave, the plaintiff now, along with David Gindler and Jason Sheasby from Irell.

THE COURT: All right.

MR. SHAW: Good afternoon, Your Honor. It's John Shaw for Intel; and with me on the phone are George Newcombe and Patrick King from Simpson Thacher.

THE COURT: All right. We've got Protective Order Redux today, a subject we were talking over last November. And I've read the letters that you sent in to me for today's call. Let me just give you what I think are the issues in play here and we'll go through them one by one.

MR. SHEASBY: Your Honor, if I may interrupt?

THE COURT: Sure.

MR. SHEASBY: There has been a partial resolution to the dispute between the parties. This is Jason Sheasby for AmberWave.

THE COURT: I'm glad you interrupted. Tell me what it is.

MR. SHEASBY: There are two issues on the table. One is the scope of the prosecution bar and one is how an attorney substitute for prosecution bar can participate in the reexamination. The reexamination issue has been resolved. Intel and AmberWave have stipulate the neither party is going to file reexamination on the patents-in-suit and based on that, we are prepared to agree to Intel's more stringent standard for participation and reexamination.

MR. NEWCOMBE: No, no, no. Excuse me. This is George Newcombe. It's my understanding, judge, I agree with Ms. Sheasby up to the point where those portions of the protective order dealing with reexam just go out of the window. They're not in the protective order at all. Once we take this off the table, it was my understanding that this whole portion of the protective order goes out and we are just left with the prosecution bar and how wide that would be; but by stipping to neither party will put patents in suit into reexam, that we would eliminate the entire carve out.

THE COURT: It sounds like you guys are not as fully together as you thought on that.

MR. SHEASBY: That appears to be the case.

THE COURT: Well, I'll tell you what. We won't take that up today. Hopefully, we won't have to take it up on another occasion.

MR. GINDLER: This is David Gindler for AmberWave. I think that issue is something we will be able to resolve, and I think it need not be addressed further today.

THE COURT: All right. Then let's talk about the scope of the bar. Who wants to take the lead?

MR. NEWCOMBE: Your Honor, can I go first? This is George Newcombe for Intel.

THE COURT: Fine.

MR. NEWCOMBE: The problem and why we're concerned about this issue is that we literally are talking about the crown jewels of the Intel once we start turning over all the internal designs and processes by which we make our microprocessors to them. The issue is as follows: We maintain that the bar should apply to all counsel of record, period. AmberWave believes it should only be counsel of record who has reviewed the AEO material. And the reason we think that is inadequate is multiple fold, but the most practical thing is that if you're on the team, if you are on the litigation team, issues of infringement of claim construction, of validity are all of necessity going to be and should be driven by counsel's analysis of our most sensitive materials. I don't know how, whether or not someone has actually looked at those documents but as part of the team they're going to be exposed to that analysis.

If those people can then turn around and, as we have found out that AmberWave has on the '890 application, while we're negotiating this, put in additional amendments, and that is one that may be in suit, and when we ask them in a letter to say has anybody contacted, been in communication with prosecution counsel over those amendments, the only response back was no one who had reviewed AEO material has been in contact. And that doesn't make us very comfortable because I don't think it's possible to separate out the analysis of the case, working on the case by virtue of who has looked at AEO material and who is working on the case

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and therefore subjected to the kinds of deliberations and analysis that will be driven -- of necessity, could and should be driven in the litigation by those materials.

And so we're very, very concerned by trying to make this distinction over who has actually reviewed and not reviewed the materials, and we believe that the bar should be as to counsel of record, period. And if you look at Brown Bag, where the balancing test is really over balancing their ability to litigate the case which is completely unaffected, they can litigate this case because we're saying everybody on their team can have access to this and work as they will to defend or prosecute the case.

And as to other patent prosecution work, that is something which AmberWave has its own separate prosecution counsel. They can go ahead and do anything they want but there is no impact on the ability of Amberwave's litigation counsel to litigate the case while still preventing them from participating broadly, any of them, in patent prosecution.

THE COURT: Why don't you speak to me for just a moment, Mr. Newcombe, about the position they've taken and which you haven't mentioned that there is some sort of detrimental reliance that has been going on here. That they were quiet for ten months and now they have people involved and that's a problem.

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MR. NEWCOMBE: I think that is actually a misstatement of the record as follows, and I'll run through the chronology with you.

Starting on November 23rd, which is right after our previous conference, every draft of the protective order that we sent them, back to November, had the language applying the prosecution bar to all counsel of record. AmberWave's draft they sent back to us on December 12th actually contained our language on that.

The first time that the limitation on review that was put in, now they say only the people who have reviewed AEO material, was actually on February 5th. And in response to that, we, in fact, said now we're getting concerned by this caveat of just "reviewed." We expanded the scope of the prosecution bar to be, to include "all patent prosecutions, that field of semiconductor devices.

Then we learned that the '890 application was in fact amended. We sent a letter saying, Have you communicated with prosecution counsel? And the only response we got back is only nobody who had reviewed our AEO materials had communicated. So I think the chronology does not support the claim that we have tried to sandbag them here and there has been detrimental reliance. This has been a position we staked out pretty clearly starting November 23rd and going forward.

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THE COURT: All right. Mr. Gindler, are you going to be speaking own behalf of Mr. AmberWave?

MR. GINDLER: No, Mr. Sheasby will.

THE COURT: All right. Mr. Sheasby, go ahead, sir. The ball is yours.

MR. SHEASBY: Sure. So I think it's important exactly to clarify exactly what AmberWave's position is. If litigation counsel is not subject to the prosecution bar, they can't do the following: They can't review Intel produced documents that are designated AEO, attorneys' eyes only technical information. They can't review internally produced memoranda at our firm, for example, that has within it Intel attorneys' eyes only technical information. And they can't discuss with people who are subject to the prosecution bar Intel attorneys' eyes only technical information.

THE COURT: I think I've got a pretty good handle on your position. I need you to speak to the specific position that your opponents have which is whether it's being expressly discussed or not, if somebody who has reviewed attorneys' eyes only information is sitting down with somebody who is on the litigation team but whom you have chosen to say, okay, no, you're not on the attorneys' eyes only review list, and they are working together to craft claim construction position and litigation positions,

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when that person goes off to prosecute patents, they will inevitably have acquired an understanding or a view that is informed by the technical information that the other person has reviewed.

That's, I take it to be, the heart of the argument that is being pressed on me by your opponents and that is the argument I need you to directly address.

MR. SHEASBY: Sure. There is no doubt people who are not subject to the prosecution bar are going to be able to play a limited role in this case. They're not going to be able to discuss infringement theories with us. We recognize that.

THE COURT: How does the other side know that, though?

MR. SHEASBY: The other side knows it because we are under protective order and we would be in Contempt of this Court if I discussed attorneys' eyes only technical information with a member of this team who was not under the protective order.

THE COURT: I'm sorry. I might be talking past, we may be talking past each other. I guess what I'm asking is when you say we can't discuss infringement positions, which is what I thought I heard you say a second ago, I thought you had a position -- and maybe I'm wrong. I should maybe be quiet and hear more about what your position is,

but I thought your position was people who had access to attorneys' eyes only information and people who didn't could in fact discuss infringement positions, could in fact discuss claim construction issues, that that was going to be a wide range and wide open discussion even if the person who had attorneys' eyes only information wasn't permitted to say, oh, I saw this document from Intel that revealed such-and-such and such-and-such. But short of doing that step, which they weren't permitted to do, they were allowed to talk about what they thought the right positions were going to be.

MR. SHEASBY: Well, I think it's somewhere in the middle, which is to say attorneys with access to the information would need to self-censor themselves and obviously not be able to disclose AEO technical information.

I will point out that the protective order that they agreed to allows attorneys who have access to attorneys' eyes only technical information to advise their clients on those issues as well. And so the point is that certainly we would, there would be strategic discussions potentially about this is the position we're taking on a matter of validity let's say that we would have with people who are not subject to the prosecution bar. But that discussion really has, doesn't implicate technical information at all. And so there would be no reason not

to be able to have that discussion.

THE COURT: They're not contesting that piece; right? I mean when you say everybody agrees that there can be some high level strategic discussion even with clients, people who are not subject to the attorneys' eyes only provision, that if I have understood right, that is some high level strategic discussion. Everybody agrees with that; correct?

MR. NEWCOMBE: Your Honor, I don't know what that means. It's not in the protective order. I don't know what language that he is referring to so our position is pretty clear that there shouldn't be -- that litigation counsel should be separate and apart from prosecution counsel here, period.

MR. SHEASBY: Your Honor, if I may interrupt. I think if you look at the case law on this subject, you will see there is a common touchstone, even the cases that Intel cites in its own papers, and what those cases say is that attorneys on a litigation team have a choice. They can choose to view confidential information and be subject to the prosecution bar, but they can choose not to view that information and recognize that it's the role they're going to be able to play in that litigation is limited.

I'm not aware of any case I don't think Intel has cited any case that has said, per se, if you are on the

litigation team, you are subject to a prosecution bar. And I think that there is a basic reason for that, and it's one of fairness, which is that AmberWave has put together a litigation team and that litigation team includes members who potentially are going to be subject to the prosecution bar and have agreed to be or able to be and includes members and members of our firm who are not able to agree to that. And now 10 months into this litigation and four and-a-half months after our previous hearing before this Court, they're telling us everyone in your litigation team is subject to a prosecution bar.

THE COURT: Well, Mr. Sheasby, you heard Mr. Newcombe tell me they've been telling you since last fall.

MR. SHEASBY: Your Honor, I do not agree with that. In the protective order that the parties agreed to in almost every -- on November 9th, the parties agreed to a protective order and there are two outstanding issues: participation of reexamination and challenge to experts. Everything else was agreed to. That form of protective order, on November 8th, did not contain a per se bar such as applied to all litigation counsel, regardless of whether they received information.

For Mr. Newcombe, who did not even negotiate the protective order, to suggest this issue was brought up before November 8th or November 22nd is simply not accurate.

I had a phone conversation with Intel counsel this Sunday, and it was this Sunday for the first time that Intel counsel said to me, yes, we want it to apply to all litigation counsel.

THE COURT: I find this fascinating when I can have people telling me as to historical facts diametrically opposed things. That nothing was said about this until last weekend on the one side and the other side saying we've been saying it for the last five months. It's amazing.

MR. KING: Your Honor, if I may interject here. This is Patrick King for Intel on behalf of Intel who did negotiate with Mr. Sheasby the protective order. And Mr. Newcombe is well aware what the protective orders we've been exchanging say because he has copies of. He has looked through all of them and what he says is accurate.

The first time the idea of this being confined to only two attorneys who reviewed the materials was raised by Mr. Sheasby recently when he brought that to my attention. It alarmed me and I discussed it internally with my team, including Mr. Newcombe and it brought into focus the danger of the position they were taking.

THE COURT: All right.

MR. SHEASBY: Your Honor, I hate to interrupt here. I'd like to address one other issue which bothers me.

THE COURT: Is this Mr. Sheasby?

MR. SHEASBY: This is Mr. Sheasby.
THE COURT: Okay. Go ahead, sir.
MR. SHEASBY: That's Mr. Newcombe's characterization of the recent activity in the '890 application. I just want to clarify something to make it very clear, which is that no Irell attorney who had access to Intel's attorneys' eyes only confidential information participated in the amendment of claims in that application. It's not just those who reviewed Intel's documents, it's those who had any access to the information, full stop.
MR. NEWCOMBE: Your Honor, it's George Newcombe.
What bothers me here is this self-censored concept that somehow lawyers are going to segregate in their head.
THE COURT: All right. You know, I don't need the further argument.
MR. NEWCOMBE: Thank you.
THE COURT: The parties' positions have been effectively laid out in your submissions and statements here on the teleconference have been of assistance. Let me tell you what I'm going to do first and then I'll tell you why I'm doing it.
I'm sorry you couldn't come to a resolution of this, but I'm coming down on the side of Intel in this. And the reason is I don't agree that there is a fair or an

appropriate way to draw the line AmberWave wants to draw, even people acting in the best of faith in self-censorship.
Now, it may well be that this is the first time this has ever been done, but I've got to say I think it may be the first time that anybody has tried to put the position in quite the fashion it's been put in this case. In the past when I have seen this, and I have seen it on a regular basis, the context has been in-house lawyers who want to be working with outside counsel and have an access to everything and that is where the bar has frequently and regularly come up.
I've not had occasion to see a case where somebody with the outside counsel wanted to parse it as finely as AmberWave does and says, well, we want some people in outside counsels' firm to have access and some people on outside counsels' firm not to have access and those on the outside that are doing it to have them still be able to prosecute.
In the CEA case, it's true that I had a situation something like that where they had specifically a specific set of people. And you folks have cited this case back to me. I've gone back and looked at it again. That was a circumstance where there was a set of people and they wanted them to have access to attorneys' eyes only information and still be able to prosecute patents. And

to me, that was pretty straightforward. I said no.
Now, here is a circumstance where in advance people don't really know what going to happen perhaps but inevitably, you know, I just think Intel has the better side of this argument. If you are fully informed by the technical information of your opponent and you are sitting down talking about how to frame up an infringement position, a claim construction position, something like that, how are you in your mind going to say, well, I can't say that sentence to my partner or I can't utter this idea to them because it's informed by technical information that I have had access to. I just don't think you can slice it that carefully or that fine. It won't work. And in some way, it gives a benefit to prosecuting counsel that ought not be there. It just shouldn't.
It's an artificial world we have to step into when we're dealing in a case like this where one side gets into the other side's information in a way that no sensible businessperson would ever permit but for the fact we have a dispute and so we have to allow that. So we put people in the bubble and they've got to stay in the bubble. And I'm not comfortable saying, okay, I trust you. Not because I don't trust you in the sense that I think anybody would be dishonest but I don't think anybody should be trusted to try to separate out in their own brain what they can and can't

say to their own partners and associates in the context of litigation. They ought to be able to have free and open discussion. As they're doing that, some of this information may inevitably leak out.
So I'm going to go ahead and say if you guys can't work it out, I'm working it out for you this way. Intel gets it the way it wants it. If somebody is going to work on this litigation, this litigation which is informed by the attorneys' eyes only material, they're not prosecuting patents. If they're not going to be working on this case, then they can do whatever they want with respect to this field. But if they've got access to this Intel stuff, they can't be working in this field.
Now, I regret that people seem to have a different view on who knew what when about these positions and I can't sort that out right now. I don't know who has got the better of that. But that's how we're going to handle it.
Now, you folks have already resolved the other piece of it that you put before me. I've resolved this piece of it. You ought to be able to get a protective order in place and actually get it to me for signature now, I hope.
MR. GINDLER: Your Honor, this is David Gindler for AmberWave. I wanted to raise just one issue. And the

issue is the following: During the course of this case, Intel has identified many, many pieces of prior art to us as being potentially relevant to the patents-in-suit and maybe others. So we have possession of this information. We get informed from time to time that a new patent is going to issue by the Patent Office.

I think that AmberWave has an obligation, if it has possession of prior art that could be relevant, to make sure that prior art is submitted to the Patent Office. Well, that is prior art that is being given to us by Intel in the course of the litigation. And we want to make sure that our client, the assignee of the patent rights, complies with all of its obligations in the Patent Office to insure that any prior art that could conceivably relevant and important to an examiner gets submitted.

So my concern right now is just one very narrow one, which is that we're getting lots of prior art cited to us. I'm going to guess we're going to get a lot more prior art cited to us. And we may look at that, we may be told by our client, hey, the patent X is going to issue. We have a notice of allowance it's going to issue in five months.

We take a look at the claims. We take a look at the prior art that we have in our possession and we say, holy smokes. We have some things here that we think that, on balance, it would be a better thing if we gave that to

the Patent Office. And I think we want to be in a position to be able to tell the prosecution counsel we have been informed by Intel of the following pieces of prior art. We got them in the context of other patents but you've sent us the allowed claims of this patent and we think 25 pieces of this prior art conceivably might be considered relevant by the examiner. And we want to be able to put that into the hands of our prosecution counsel to make sure that AmberWave complies to the letter with its obligations to the Patent Office.

THE COURT: Mr. Newcombe.

MR. NEWCOMBE: Your Honor, this is the first time this concern has been raised, so we're reacting to it on the fly.

I don't like the concept of there being contact between the two camps. And maybe we need to flesh this out between us a bit to find out exactly what they mean and what is involved. Literally, this is the first time, at least to my knowledge, this concept, this particular concept has been raised.

MR. SHEASBY: Your Honor, this is Jason Sheasby. I can just speak for -- I think there is two sets of partners and two sets of associates on the call and I think the associates need to maybe connect better with their partners. But Pat King and I, in the form of protective

order you have, have a carve out in place so that AmberWave counsel would be able to submit information for the information disclosure statement.

THE COURT: All right.

MR. NEWCOMBE: So in other words, Jason, you're saying this problem has been resolved?

MR. SHEASBY: This problem has been resolved.

MR. NEWCOMBE: Then I will stop talking.

THE COURT: Well, you know what? Now, it might have just gotten unresolved by surfacing it here. I hope not. You ought to go back and have your discussions. I don't want anything that I have said on this call in relation to prosecuting patents to prevent you from having sensible compromises in relation to an issue like the one that has just been related to me.

MR. NEWCOMBE: Your Honor, this is George Newcombe. I think this gets back to my understanding which was the stipulation that we presented to Your Honor addressed the entire issue of the communication with respect to prior art because that carve out was supposed to completely go. And we'll continue this discussion but I think that is the basis of maybe some of the confusion here.

THE COURT: Well, you guys see if you can work it out. Let me say that if you can't work it out, I thought you were on sort of the right track before, both of you,

with the compromise you've been working toward, even though you weren't able to come to "yes" about how many communications you could have. But if you can't work that out because there is an issue like his that one side thinks still has to have at least a bit of a door open on, you ought to go back and take a look at the progress you had already made and not throw all that out the window.

All right. Well, I'm sorry to hear that we're not quite on the same page where we thought we were and yet I'm not able to help you resolve it because there is not a point on it at this stage. So you guys take the piece that we have got resolved and the piece that you haven't and see if you can't come up with a compromise that addresses everybody's concern adequately and get me something in writing. If you can't, let's get on the phone promptly and get this done so we've got a protective order and moving forward. All right?

MR. NEWCOMBE: Yes, Your Honor.

THE COURT: All right. Thanks for your time.

(Unidentified speaker): Your Honor?

(Telephone conference ends at 2:30 p.m.)

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

- - -

INTEL CORPORATION,	:	CIVIL ACTION
Plaintiff and Counter-defendant,	:	
v.	:	
AMBERWAVE SYSTEMS CORPORATION,	:	
Defendant and Counter-claimant.	:	NO. 05-301 (KAJ)

- - -

Wilmington, Delaware
Tuesday, November 8, 2005 at 3:30 p.m.
TELEPHONE CONFERENCE

- - -

BEFORE: HONORABLE KENT A. JORDAN, U.S.D.C.J.

- - -

APPEARANCES:

YOUNG CONAWAY STARGATT & TAYLOR
BY: JOSY W. INGERSOLL, ESQ., and
JOHN W. SHAW, ESQ.

and

SIMPSON THACHER & BARTLETT, LLP
BY: GEORGE M. NEWCOMBE, ESQ., and
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Registered Merit Reporter

APPEARANCES: (Continued)

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and

IRELL & MANELLA, LLP
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JASON G. SHEASBY, ESQ.
(Los Angeles, California)

Counsel for AmberWave Systems Corporation

- oOo -

P R O C E E D I N G S

(REPORTER'S NOTE: The following telephone conference was held in chambers, beginning at 3:30 p.m.)

THE COURT: Hi, this is Judge Jordan. Who do I have on the line?

MS. INGERSOLL: For Intel, Your Honor, it's Josy Ingersoll and John Shaw at Young Conaway; and George Newcombe at Simpson Thacher. I think he is in Palo Alto.

MR. NEWCOMBE: That's correct.

MR. BLUMENFELD: Good afternoon, Your Honor. Jack Blumenfeld for AmberWave; along with David Gindler and Jason Sheasby at Irell & Manella in Los Angeles.

THE COURT: All right. I have your letters regarding this dispute over the protective order and I've read them. So while I recognize that one might make the argument as AmberWave does that the burden of a "more restrictive" protective order falls on Intel, my questions are more for you in the first instance, folks at AmberWave.

So, Mr. Blumenfeld or Mr. Gindler, who is going to be speaking to this?

MR. BLUMENFELD: Mr. Gindler is.

MR. GINDLER: I think actually Mr. Sheasby will be addressing this.

THE COURT: Mr. Sheasby? All right.

I am certainly familiar with plenty of institutions of higher learning who are aggressive in pursuing patents and in enforcing them and so the fact there is a charitable institution or a higher education institution that is doing that, how does that make it any less of a concern for Intel? Why should they say I don't care whether my rights get lost to a for-profit corporation or to a university? Help me with the logic there.

MR. SHEASBY: Yes, Your Honor. That limitation actually came out of discussion with Intel during the protective order in which they were concerned that we would retain an expert, an engineer working at one of her competitors, say, for example, AMD.

I think if you take a step back and understand the case law on this subject, it makes our position a little clearer. Intel doesn't cite a single case that has ever applied a prosecution bar to expert witnesses. In fact, the major case that it relies on is an opinion written by Your Honor in the CEA case, and in that case there was a prosecution bar applied to trial counsel who was prosecuting patents for competitors. And if you look at the protective order that was entered in that case, you will see that for expert witnesses there was no prosecution bar.

THE COURT: Well, I'm prepared to say there may not have been a prosecution bar because there wasn't an issue. So I'm trying to get at, when you say they haven't cited any cases to support it, do you have any cases that say expert witnesses aren't an issue as opposed to attorneys if they're pursuing patents?

MR. SHEASBY: Well, I think there are two lines of cases that relevant. And the first line stems out of U.S. Steel which is a Federal Circuit opinion. And what that case says is that decisions about limits on access to documents need to be made on a person by person basis based on the relationship and activities of the parties. Now, it may in fact be the case that there are certain types of expert witnesses for which the access to confidential information presents just an unacceptable risk of

inadvertent disclosure. And we've actually built in a structure for that. That structure is when we want to use an expert witness, we have to disclose that to AmberWave and disclose their qualification and their professional experience, and AmberWave is given the opportunity to object. And if we can't resolve those objections, it goes before the Court.

And so there may well be situations in which certain expert witnesses are going to be inappropriate for this case because of the concerns that Intel cites in those letters, and we're prepared to deal with that on an expert witness by expert witness basis. But what we don't think is appropriate and what we haven't found any case law support for is across the board per se ban saying if you are an expert witness, you have to have a prosecution bar in place.

THE COURT: Well, now maybe I misunderstood. I didn't understand them to be saying that any expert witness has to have a prosecution bar. Well, let me take that back. I understood this to be directed at people falling into this category of are you working in this field? I mean they're not worried about people who aren't working in the field, right? Well, maybe I should ask them that question.

MR. NEWCOMBE: Yes, Your Honor. That's correct. There is a limitation to the field which is semiconductor

fabrication and design.

MR. SHEASBY: And, Your Honor, the only expert witness this case is about probably speaking semiconductor fabrication and design and so that the rules follow the exception. All of our expert witnesses would be working in the field of semiconductor fabrication and design. If they weren't, they would be inappropriate expert witnesses. So despite that limitation, what it really drops down to is if we have an expert witness, they are automatically subject to those prosecution bar for Intel's litigation. What we're asking for is not to say that there may not be situations in which a bar would be appropriate or exclusion of expert witness would be appropriate, but --

THE COURT: Well, I'll tell you what. Why don't we shorten this up. Here is how we'll do it. We won't have the bar in there at the front end, but I will put you on notice right now that if you try to put somebody forward who they can make any credible statement to me to at all as being involved in this field, I'm going to apply it. When you say there is no case, maybe that is because nobody has come forward before and said, hey, we want to use somebody who is prosecuting patents in this field as a researcher at a university and we still want to use them and we have a right to. Because that doesn't seem to me to be a tenable position. It doesn't make any difference

whether they're at a university or they're at a for profit organization. The point is you're asking for and are going to get highly sensitive, highly confidential by definition technical documents that bear on current research from Intel, and they don't have to and shouldn't have to unveil that to somebody who is looking to get patent prosecution in the very same field.

Now, maybe you guys have cast the field too broadly. I'm not speaking to that at all. I'm just giving you a general statement that if you think you can find somebody who doesn't meet the concern that they've got but that would somehow be blocked by this up front statement, I'll give you the benefit of the doubt, AmberWave, but just be on notice I hear Intel's concern loud and clear and we won't spend a lot of time on a later phone call. If they say, "hey, this is just the kind of person we're looking at" and I believe them, that's the end of the discussion. All right?

MR. SHEASBY: We understand, Your Honor. And I think we're going to have to go back and talk to Intel perhaps about the scope of the subject matter bar that they put in place.

MR. NEWCOMBE: Your Honor, this is George Newcombe. I would also add that the paragraph seven was drafted with the expectation of the bar being an up front.

If the procedure is going to be as Your Honor laid it out, then we would probably have to expand that to include their current areas of research so we can know and assess the danger.

THE COURT: Absolutely. I agree with that completely. The point is not to prevent Intel from knowing who is doing what. If you want to do this, what I hear you saying, AmberWave, is "we want to do it on a case by case basis." If you guys want to do it on a case by case basis, then the people you are proposing had better be prepared to certify all the research areas they're into so that Intel can make a sensible decision about whether it's got an objection or not.

MR. SHEASBY: No, and I will have to go back and speak with our client, but we can't imagine that would be a problem. We're certainly not looking to hide the ball in this context. We just have a situation in which the realities of being an academic researcher are that you have obligations to seek patents on your research.

THE COURT: Right. And that's in fact why I think Intel's position is not as unfounded as you are suggesting. Because these are people who are obligated and who will be seeking patent protection. So to say to Intel "now show us your stuff because we want to show it to somebody who is going to be pursuing patents," that is

problematic.

All right. Let's turn to the issue that you've got with respect to the reexamination. I think I understand the parties' respective positions on this, but why don't you let me restate it real quickly and somebody can straighten me out if I'm wrong.

AmberWave's take on this is "hey, we may want to seek reexamination. If we do, all our lawyers are going to be up the learning curve. Therefore, we want them to be able to participate."

Intel's position is "hey, it doesn't make any difference whether it's before the fact or after the fact since reexamination can end up in a different contour of the claims. You can't be allowed to have our information in your head while you are pursuing a reexamination."

Have I got your side of it right, Mr. Sheasby?

MR. SHEASBY: A slight modification, Your Honor. Here is what we don't think we have a right to do. We have no right to, litigation counsel has no right to participate in drafting amendments and reexamination. And just as a side note, because it's a reexamination, all claim amendments must be narrowing so we could never get broader claims in reexamination.

The second modification is that AmberWave is not suggesting that if we seek reexamination, the litigation

counsel has a right to participate. We understand that that is a decision that if we make, we have to live with that decision with the burdens that it places on us. What we're concerned with is in a situation where a third party or Intel were to seek reexamination of one of our patents, AmberWave wanted prosecution counsel and litigation counsel to be able to discuss the prior art that is at issue in that reexamination to make sure there is consistency across the borders. So when there is a problem we cause, we don't believe we get any relief; but if it's not a problem that we've caused, we think the narrow relief we're asking for which is no participation in claim drafting, simply being able to discuss with prosecution counsel the positions they're going to be taking regarding the patent in both the litigation, the reexamination is narrow and reasonable.

THE COURT: Okay. Mr. Newcombe.

MR. NEWCOMBE: Thank you, Your Honor. I think you captured the essence of our argument in your summary. And I point out that saying it narrows doesn't help at all because you can, by being aware of all the bar specific internal confidential information, you can use the reexamination process to alter the scope of your claims in a manner to artfully avoid prior art yet still establish infringement. So that danger of using and misusing that

information is very real whether you are broadening or narrow.

Second, there is only two things you can do in a reexamination to avoid the patents being invalid, and that is one to change the scope of the claim in a manner which avoided the prior art or to argue a claim modification of scope to the Patent Office does the same thing. Both of those processes involve, if someone has in their head all of the secret sauce, all of the highly confidential information. I don't know how they separate that out. And that's the danger that we think requires trial counsel not to be involved not only in drafting claim language per se but in formulating responses to all its actions which have the effect of achieving that result.

THE COURT: Okay. Mr. Sheasby, do you want to say anything in response?

MR. SHEASBY: Yes. You know, Your Honor, I think whether it's a reexamination or another litigation or this litigation before the Court, the litigation counsel are going to have knowledge about Intel's products that are going to allow them to "take positions on the scope of the claims" so whether that occurs in a reexamination on the litigation doesn't strike me as not a meaningful distinction. The idea we're not going to be able to participate in claim drafting seems to me to be a significant protection

for Intel. In fact, I should say that Intel's position in their letter brief is a shock to AmberWave because in previous discussions we've had with Intel's counsel, they had actually agreed in principle to allow us to participate in reexamination for the narrow purpose of consistency and positions, not for drafting claims.

THE COURT: Well, explain to me what you mean when you say "consistency and positions but not for drafting claims."

MR. SHEASBY: Sure.

THE COURT: In your view of this, let's say you're the guy and you've spent months working on this case and spent who knows how many tens of, maybe hundreds of hours immersed in highly confidential documents. And one of your colleagues comes to you who is now roped into a reexamination, not by AmberWave's choice but somebody else's.

MR. SHEASBY: Intel's choice.

THE COURT: Go ahead. We'll make those guys the bad guys. They've got the temerity to challenge your patent at the PTO, start a reexamination and now your colleagues sits down with you. How do you envision this discussion taking place? When they say, "well, the challenge is to this specific claim. We think if we do this or we do that with the claim, we can get past the reexamination." In your

mind, would that be "drafting claims" or would that just be advising on strategy and prior art?

MR. SHEASBY: That would be drafting claims, Your Honor. If I had a discussion with prosecution counsel about how claim should be amended, that clearly would be within the scope of drafting claims. The conversation that I do think appropriate is "the piece of prior art was cited against us. We know this is a piece of prior art that's in play in the litigation. What position are you guys taking on this piece of prior art? What is your view of what it discloses and what it doesn't disclose because we want to make sure that we don't say, we don't take inconsistent positions in the prosecution."

THE COURT: So what you are saying is you want to be able to talk about, you want to be able to confer confining any discussion to a statement about the meaning of prior art. Have I understood that right?

MR. SHEASBY: Yes, the discussion about the prior art. Yes, that's correct, Your Honor.

THE COURT: All right. Now, Mr. Newcombe, I want you to help me out. How would a discussion of that sort be problematic? How would knowledge of your client's technical information be violated if somebody said, "hey, what are the parties' competing positions in front of the District of Delaware with respect to the Gadzooks reference

or whatever?" How does that that implicate your technical information?

MR. NEWCOMBE: Your Honor, if the limitation -- keep in mind what we're talking about here is participation in response to Office Actions. Okay? That is what we say they can't do. That's what I think in the hypothetical Your Honor laid out was, what we envisioned the conversations would be wherein how do we play this before the Patent Office? What can we do to avoid this reference? And that's why we have it limited to responses to Office Actions.

If they were to say, "look, obviously they have to have separate prosecution counsel," that is a given because that person is going to have to be involved in detailed analysis claims and what not. But if they were simply to say "here is our analysis of the prior art that we've come up against in the case," and give it to them, all right? So let's say "here is your prior analysis. Take it. You guys do what you need to do to make sure this is not used inconsistently." Fine, then there is no back and forth.

But what I'm concerned about, you get into a very slippery slope once you start talking, discussing it, getting into conversations about it. I don't know how that doesn't slide into what you are going to use it as before the PTO. I have no problem with them telling them how they

use it, how they analyze it, giving them the work products so they can say "here is all the prior art we've come up with and how we view it," but then how that interplays with the reexamination proceeding they should not be involved in.

THE COURT: Well, you know, I think you folks ought to discuss how to. And it's going to get wordy but you ought to take a crack at working on that piece of common ground. I am exquisitely sensitive to both parties in this litigation have their legitimate needs to take care that their research and development work not be misused.

And so once again, as a general statement, I am more sympathetic to the Intel side than the AmberWave side here. I just think one of the consequences of being involved in litigation is you are going to run into costs and expense, and if that means you are going to end up with some duplication costs and expense to avoid revealing somebody's highly technical information, maybe that is just one of the fallouts of modern day litigation, unfortunate but real.

However, I think there is a legitimate scope of common ground here for you folks to work out, a basis for some limited sharing of information. And we've just heard it discussed. So I put that back on you folks to talk about how a discussion or a statement of prior art position could

be legitimately shared, avoiding discussion of the sort that we've all agreed would be inappropriate and providing some sensible safeguards so that it doesn't devolve into that discussion once you are giving a prior art position. If you think that is too complicated and you can't work it out, I'll understand, but I think you ought to be looking there in the first instance.

So, do you think you can work something out in that regard, Mr. Sheasby?

MR. SHEASBY: I think so, Your Honor. I think you should give us the opportunity to do so.

THE COURT: All right. Mr. Newcombe, I'll ask you to work on that in good faith. I hope my statement that I've got some sympathy for Intel's position doesn't harden you up to any reasonable discussion that Mr. Sheasby and company might want to have with you.

MR. NEWCOMBE: It won't, Your Honor. I think we all in the course of this have recognized the area where there is the problem and we'll work towards achieving something that will be efficient in using knowledge that legitimately can be used from litigation counsel but not crossing the line into an area that could devolve into what we all agree is improper.

THE COURT: Okay. All right. Well, there is the rulings on the issues you put before me. Is there

anything else we ought to be talking about while we're all on the line together here? Counsel for AmberWave?

MR. SHEASBY: Not from us.

THE COURT: Okay. Intel, from you folks?

MR. NEWCOMBE: No, Your Honor.

THE COURT: All right. Thanks for your time. Good-bye.

(The attorneys respond, "Thank you, Your Honor.")

(Telephone conference ends at 3:55 p.m.)

EXHIBIT C

Bussey, Jason

From: Gindler, David [DGindler@irell.com]
Sent: Wednesday, March 22, 2006 8:41 AM
To: King, Patrick
Cc: Sheasby, Jason; Vanderlaan, Chris
Subject: Proposed Stipulation Regarding Reexamination Proceedings
Attachments: 1440707_1.DOC

<<1440707_1.DOC>>

Pat,

Following up on your conversations with Jason regarding reexamination, attached is a proposed stipulation. Let me have any comments at your earliest convenience.

David I. Gindler, Esq.
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"NBEMF <irell.com>" made the following annotations.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

AMBERWAVE SYSTEMS CORPORATION, Plaintiff, v. INTEL CORPORATION, Defendant.	)	Civil Action No. 05-301-KAJ Consolidated

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between AmberWave and Intel as follows:

1. Neither party has filed or caused to be filed, directly or indirectly, a reexamination request pursuant to 35 U.S.C. § 302 or 35 U.S.C. § 311 (a "Reexamination Request") on United States Patent Nos. 6,831,292, 6,881,632, 6,946,371, any patent that issues from United States Application No. 10/774,890, any patent that may later be added to the above-referenced action, or any patent now existing or that subsequently issues that claims priority to any application to which any one of the foregoing patents claims priority (the "Subject Patents"), or a foreign equivalent of any such proceeding in a foreign jurisdiction.

2. Neither party is aware of any third party that has filed, is considering filing, or intends to file a Reexamination Request on the Subject Patents, or a foreign equivalent of any such proceeding in a foreign jurisdiction.

3. Neither party will file or cause to be filed, directly or indirectly, a Reexamination Request on the Subject Patents, or a foreign equivalent of any such proceeding in a foreign jurisdiction.

4. Neither party will discuss with, request, or assist, a third party, directly or indirectly, in filing a Reexamination Request on the Subject Patents, or a foreign equivalent of any such proceeding in a foreign jurisdiction.

Dated: March __, 2006

Respectfully submitted,

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Attorneys for Intel Corporation

SO ORDERED: _____
Hon. Kent A. Jordan

Dated: _____, 2006